FILED
JUL 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2000 and 97-2030

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

---

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, et al., Petitioners

v.

DELORES SCOTT SULLIVAN, et al., Respondents

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

# BRIEF IN OPPOSITION

---

*LORALYN MCKINLEY
*McKinley and Vonier*
*1333 Race Street*
*Philadelphia, PA 19107*
*(215) 569-1644*

*Counsel for Delores Scott Sullivan, William Battle, Anthony Cancila, Louis Baumgartner, and Class Plaintiffs*

ALAN B. EPSTEIN
*Jablon Epstein*
*The Bellevue, Ninth Fl.*
*Broad Street at Walnut*
*Philadelphia, PA 19102*
*(215) 790-0300*
*Counsel for Charles Matthews, Christopher Costello, Lisa Lex, Susan Hansen, Terrence Ervine, William C. Dillon, and Class Plaintiffs*

**Counsel of Record*

Thomas J. O'Brien
*Galfand, Berger, Lurie,*
*Brigham Jacobs, Swan,*
*Jurewicz, & Jensen*
*1818 Market Street, 23rd Floor*
*Philadelphia, PA 19103*
*(215) 665-6814*
*Counsel for PhilaPOSH*

Linda M. Martin
*Willig, Williams & Davidson*
*1845 Walnut Street, 24th Floor*
*Philadelphia, PA 19103*
*(215) 656-3600*
*Counsel for Intervenor*
*Philadelphia Federation of Teachers*

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Pennsylvania Workers' Compensation Act, 77 Pa. Stat. Ann. Sections 1, *et seq.*, creates a public benefit in workers' compensation benefits, including wage replacement and medical benefits. These benefits constitute a recognized property interest under Pennsylvania law. Pursuant to Sections 306(f.1)(5) and (6), 77 P.S. Sec. 531(5) and (6) of the Act, insurance companies providing workers compensation insurance to Pennsylvania employers are delegated the power by the state to stop injured workers' medical benefits without notice or a prior opportunity to be heard.

1. Do Sections 306(f.1)(5) and (6) of the Pennsylvania Workers' Compensation Act, which provide for the cessation of workers' compensation medical benefits without notice to the injured worker or any pre-deprivation opportunity to be heard, violate the injured workers' right to due process of law?

2. Are Petitioner-Insurers state actors when they deprive injured workers of their workers' compensation medical benefits with the sanction of, and through joint conduct with, the Pennsylvania Bureau of Workers' Compensation in accordance with the procedure set forth in Sections 306(f.1)(5) and (6) of the Act?

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| Counterstatement of Questions Presented | | i |
| Table of Authorities | | iv |
| Counterstatement | | 1 |
| Reasons for Denying the Writ | | 10 |
| I. | THE COURT OF APPEALS CORRECTLY FOUND THE INSURERS TO BE STATE ACTORS IN THE CONTEXT OF UTILIZATION REVIEW | 10 |
| | A. The Analysis Below was Based On Well Established Supreme Court Precedent | 10 |
| | B. Applying Established State Action Analysis, The Court Below Properly Found State Action | 13 |
| | C. The Decision Below Does Not Conflict With Other Circuits | 15 |
| II | THE THIRD CIRCUIT'S DUE PROCESS HOLDING DOES NOT WARRANT REVIEW | 18 |
| | A. The Due Process Issue Is Moot | 18 |
| | B. Whether Medical Benefits Are Property Was Not Pressed Or Passed Upon In the Court Below | 19 |

**Page**

C. Workers' Compensation Medical Benefits Are "Property" Under Pennsylvania Law ..... 20

D. The Third Circuit Properly Invalidated The Statute Because It Provided For No Pre-deprivation Notice Or Opportunity To Be Heard ..... 22

III Conclusion ..... 30




## TABLE OF AUTHORITIES


**Cases** **Page**

*Arizona v. California*, 460 U.S. 605 (1983) ..... 24

*Baksalary v. Smith*, 579 F.Supp. 218 (E.D. Pa. 1984), *appeal dismissed*, 469 U.S. 1146 ..... 6, 17, 18, 22

*Barnes v. Lehman*, 861 F.2d 1383 (5th Cir. 1988) ..... 17

*Bell v. Burson*, 402 U.S. 535 (1971) ..... 24

*Bible v. Commonwealth of Pennsylvania*, 548 Pa. 247 (Pa. 1997) ..... 9, 18

*Blum v. Yaretsky*, 457 U.S. 991 (1982) ..... 11

*Board of Regents v. Roth*, 408 U.S. 56 (1972) ..... 20, 21, 22

*Boddie v. Connecticut*, 401 U.S. 371 (1971) ..... 3, 23

*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) ..... 11

*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) ..... 3, 24

*Congleton v. Department of Public Welfare*, 48 Pa. Comwlth. 615 (1980) ..... 21

*Connecticut v. Doehr*, 501 U.S. 1 (1991) .. 23, 24, 25, 26, 27, 28

**Cases** **Page**

*Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994) ..... 29

*Dowty Corp. v. Workers' Compensation Board of Review.C.A.B.(McKelvey)*, 152 Pa. Commw. 467 (1993) ..... 13

*Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) ..... 12

*F.D.I.C. v. Mallen*, 486 U.S. 230 (1988) ..... 25

*Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) ..... 5, 11

*Fleming v. Workers' Compensation Com'n of Virginia*, 78 F.3d 578(4th Cir. 1996) ..... 6, 16

*Fuentes v. Shevin*, 407 U.S. 67 (1972) ..... 3, 23, 24, 25

*Gilbert v. Homar*, ___ U.S. ___, 117 S.Ct. 1807 (1997) ..... 25

*Goldberg v. Kelly*, 397 U.S. 306 (1970) ..... 3, 24

*Goss v. Lopez*, 419 U.S. 565 (1975) ..... 24

*Grenz v. EBI Orion Group*, 1992 WL 158158 (9th Cir. July 9, 1992) ..... 6, 16, 17

*Hall v. Beals*, 396 U.S. 45 (1969) ..... 19





**Cases** **Page**

*Henderson v. Workmens Compensation Appeal Board*, 69 Pa. Commw. 613 (1982) ..... 6, 18

*Illinois v. Gates*, 462 U.S. 213 (1983) ..... 19, 20

*Keller v. Old Lycoming Township*, 286 Pa. Super. 339 (1981) ..... 8, 21

*Kelmon v. Reiber*, 161 Pa. Super. 169 (1947) ..... 21

*LaChance v. Erickson*, ___U.S.___, 118 S.Ct. 753 (1998) ..... 3

*Lochner v. New York*, 198 U.S. 45 (1945) ..... 5, 9

*Logan v. Zimmerman Brush Co.*, 455 U.S. 420 (1982) ..... 1, 23, 24, 29, 30

*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) ..... 6, 11, 12

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ..... 10

*Marsh v. Alabama*, 326 U.S. 501 (1946) ..... 11

*Martin v. Hunters' Lessee*, 14 U.S. (1 Wheat.) 304 (1816) ..... 10

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 3, 4, 25, 27

**Cases** **Page**

*Memorial Hospital v. Maricopa County*,
415 U.S. 250 (1974) ..... 26

*Memphis Light, Gas & Water Div. v. Craft*,
436 U.S. 1 (1978) ..... 3, 21, 23, 24, 29

*Mullane v. Central Hanover Bank & Trust*,
339 U.S. 306 (1950) ..... 3, 24

*Parratt v. Taylor*, 442 U.S. 584 (1981) ..... 23

*Sauceda v. Department of Labor and Industry*,
917 F.2d 1216 (9th Cir. 1990) ..... 29

*Sayre v. Textile Machine Works*,
129 Pa. Super. 520 (1938) ..... 21

*Stanescu v. Aetna Life and Cas. Ins. Co.*,
101 F.3d 1393 (2d Cir. 1996) ..... 6, 16, 17

*Stonebraker v. Workers' Compensation Board of Review*,
163 Pa. Commw. 468 (1994) ..... 26

*Tulsa v. Prof'l.Collection Svcs., Inc. v. Pope*,
485 U.S. 478 (1988) ..... 11, 12, 15, 24

*Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) ..... 24

*West v. Atkins*, 487 U.S. 42 (1988) ..... 11, 12, 14, 28

*Winterberg v. Transportation Insurance Co.*,
72 F.3d 318 (3rd Cir. 1995) ..... 8, 9



**Cases** **Page**

*Zinermon v. Burch*, 494 U.S. 113 (1990) ..... 1, 23

**Constitutional Provisions**

United States Constitution

Amend. XIV ..... Passim

Pennsylvania Constitution

Art. 3, Sec. 18 ..... 8, 21

**Statutes and Rules**

Federal Rules of Civil Procedure

Rule 12(b)(6) ..... 29

Pennsylvania Workers Compensation Act

Section 306(f.1) (5) and (6), Pa. Stat. Ann. tit. 77,
Sec. 531(5) and (6) ..... Passim

**Other Authorities**

O.W. Holmes, Collected Legal Papers ..... 10

## COUNTERSTATEMENT

In 1993 the Pennsylvania legislature amended the Workers' Compensation Act by adding a utilization review procedure which permitted insurers or self-insured employers to stop the medical benefits of thousands of injured workers, without notice and with no pre-deprivation opportunity to be heard. This amendment was part of a legislative package ostensibly directed at cost containment known commonly as "Act 44".

This case challenges the constitutionality of the utilization review provisions contained in Act 44, Sections 306 (f.1)(5) and (6) of the Pennsylvania Workers' Compensation Act, ("the Act").[1] The Respondents all are injured workers who have had their medical benefits stopped. They contend that their due process rights were violated by these provisions, and continue to be, because they constitute an established state procedure which disrupts their right to receive public benefits, in which they have an undisputed property interest, without notice and with no prior opportunity to be heard. *Zinermon v. Burch*, 494 U.S. 113 (1990). They further contend that where, as here, the state administers the benefit program and has exclusive control over the resolution of disputes among the parties, the procedures utilized must conform with the requirements of due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 420 (1982).

Pursuant to the challenged procedures, a stoppage of medical treatment can only be invoked by an insurer or self-insured employer who must initiate a state process via the Pennsylvania Bureau of Workers' Compensation ("the Bureau") in strict accordance with specific state procedural rules. If the Bureau accepts the employer's application to proceed through utilization review, (and it denies them 20% of the time), it forwards the request to a utilization review organization which it approves and selects for a determination as to whether the claimant's treatment is reasonable and necessary. While this legal process is ongoing, the insurer or employer is permitted to

---

[1] 77 Pa. Con. Stat. Ann. Sec. 531(5) and (6).

withhold further treatment to the injured worker. The statute does not provide to the injured worker any notice that his benefits will be terminated nor any pre-termination opportunity to be heard. It then precludes any participation by the injured worker in the utilization review process itself. The first opportunity the injured worker has to submit evidence or speak on his own behalf is in a post-utilization review appeal to a Workers' Compensation Judge, which occurs after the process has been completed, and at least several months after the treatment is stopped. This delay has caused eligible injured workers, who have been receiving medical benefits pursuant to the Act, to suffer unnecessary pain, to experience prolonged disability and time absent from work, and in some cases, permanent and irreparable physical injury.

**Action In The District Court**

The individual plaintiffs ("Respondents" or "injured workers" herein) in the district court action, were ten individuals who have had their medical benefits stopped through a request for utilization review. They initiated, on behalf of themselves and a class of similarly situated workers' compensation claimants, a facial challenge to the constitutionality of Sections 306(f.1)(5) and (6) of the Act by suing the Commonwealth of Pennsylvania ("the Commonwealth"), through several of its officials who were responsible for designing, implementing, and enforcing the Act. The individual plaintiffs also sued ten insurance companies ("Insurers") and the School District of Philadelphia ("School District"), as representatives of a putative class of defendant insurers and self-insured employers, for depriving them of their medical benefits through the utilization review process. The district court dismissed the insurer defendants by Order dated January 6, 1996 on the ground that they were not state actors. The due process challenge was not dependent upon the Insurers' participation, given the obvious status of the Commonwealth defendants as state actors. Accordingly, the district court proceeded to the due process issue, and by Order dated November 7, 1996, held that the statute satisfied due process because it provided for post-deprivation procedures. In so doing, the district court relied upon a



misinterpretation of this Court's ruling in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for the premise that where a pre-termination *evidentiary hearing* is not required by due process, no form of pre-deprivation process is due at all.

**The Third Circuit Decision**

Addressing only the unique characteristics of the Pennsylvania Workers' Compensation Act, a panel of the Third Circuit Court of Appeals unanimously held that when invoking the supersedeas provisions of Sections 306(f.1)(5) and (6) of the Act, the Insurers and self-insured employers were state actors. App. 19a. The Third Circuit's state action holding was narrowly tailored to the unique characteristics of the Pennsylvania Act as was made unequivocal by the Court's admonition that "[w]e expressly limit our holding here today [ ] to the unique context in which the instant supersedeas provisions arise." App 19a. As the Court recognized, because of the limited focus of its decision, its state action holding is of little precedential value outside of the Commonwealth of Pennsylvania. App. 17a.

The Third Circuit further held, pursuant to fundamental and well established principles of due process, "that the supersedeas provisions under [Sections 306(f.1)(5) and (6)] violate the dictates of due process by not affording disabled employees notice or an opportunity to be heard before their medical benefits are suspended." App. 33a. The Third Circuit's due process holding was consistent with, and supported by, the well-worn precedents of this Court. *LaChance v. Erickson*, ___U.S.___, 118 S.Ct. 753 (1998); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 306 (1970); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). Moreover, the Third Circuit's reading of the due process clause does not impose an onerous burden on the Commonwealth of Pennsylvania to remedy the problem, nor

does it exceed the procedural requirements imposed by this Court in similar contexts. *See, e.g. Mathews, supra.* Indeed, the Commonwealth of Pennsylvania, which significantly did not seek a stay of the Third Circuit's mandate and has not chosen to file a Petition for a Writ of Certiorari, already has taken action to remedy the procedural defects identified by the Court.

**Subsequent Developments**

The Insurers and the School District filed motions to stay the mandate on April 2, 1998. By Order dated April 21, 1998, the Third Circuit denied the motions and the mandate issued accordingly. Since then, the Commonwealth has modified its procedures without significant difficulty or expense. Claimants now receive pre-termination notice that utilization review has been filed, a description of the reasons for the request for review, and a pre-termination opportunity to submit written testimony to the utilization reviewer. While negotiations are continuing as to how the system should be further modified in light of the Third Circuit's decision, the significant due process concerns which prompted this litigation have been largely corrected.

**Petitioners' Contentions and Mischaracterizations**

Insurers contend that the Third Circuit's narrow holding that the "private insurance companies are state actors when they invoke the supersedeas" provisions under the Pennsylvania statute is in conflict with one published and three unpublished opinions by other federal courts of appeals that have addressed the issue in the context of various other state statutes.[2] Ins. at 8. They also contend that the Third Circuit's due process holding was "expansive" and "novel" because it required that the claimants receive notice and an

---

2 Respondents are addressing in this Brief both the petition filed by American Manufacturers' Mutual Insurance Co., et al., 97-2000, and the School District of Philadelphia, 97-2030. Henceforth, the insurers' petition will be referred to as "Ins. at __." The School District petition will be designated as "School at __."



opportunity to be heard *before* their medical benefits (in which they have an undisputed property interest) could be suspended or terminated. This requirement, the Insurers argue, imposes a duty to continue paying for treatment that they, without any medical justification or support, and in contradiction of the view of the claimant's treating physician, deem unreasonable and unnecessary. Insurers' view is not only self-interested, but also ignores the policy concerns underlying the Pennsylvania Workers' Compensation Act.

Coloring the Petitioners' contentions is the specter of unwarranted "judicial intervention." In an apparent attempt to fit the facts of the case into the confines of this Court's decision in *Flagg Brothers*,[3] Petitioners incorrectly characterize the relationship between the employer and the insurer as a purely private contractual arrangement, disregarding completely the lack of *any* contractual relationship between themselves and the injured workers, who are the intended beneficiaries of the Act. The Insurers suggest, on the basis of this faulty hypothesis, that the Act does not create a public benefit system, but, rather, simply regulates and balances the interests of private parties.

Based on these gross mischaracterizations, Insurers incorrectly invoke the discredited substantive due process case, *Lochner v. New York*, 198 U.S. 45 (1945), in support of their position that the Third Circuit's decision attempted to substitute the Court's untutored "conception of proper risk allocation in the insurance industry for that of the state legislators and regulators and the private actors involved", and that the decision disrupted the terms of a private contract between the insurers and the employers by imposing a "judicially created payment obligation" that undermines the Insurers' interest in cost containment. Ins. at 9. Insurers' specious contentions and characterizations are nothing more than a poorly disguised attempt to manufacture issues that they think this Court would be

---

3 *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

disposed to hear. When Insurers' mischaracterizations are laid bare, the substance of the Third Circuit's decision fails to offer any issues that would warrant this Court's attention.

**No Conflict Among the Circuits**

Insurers also improperly proffer that this matter must be heard to correct the confusion of conflicting legal precedents among the circuits. They cite one published court of appeals decision, three unpublished courts of appeals decisions, and a Pennsylvania Commonwealth Court decision (that was in effect overruled more than a decade ago by a three-judge constitutional court in *Baksalary v. Smith*, 579 F.Supp. 218 (E.D. Pa. 1984), *appeal dismissed*, 469 U.S. 1146), to support their contention that there is a conflict in the circuits regarding whether insurers are state actors when they invoke supersedeas provisions under various workers' compensation statutes throughout the United States. *Stanescu v. Aetna Life and Cas. Ins. Co.*, 101 F.3d 1393 (2d Cir. 1996); *Fleming v. Workers' Compensation Com'n of Virginia*, 78 F.3d 578 (4th Cir. 1996); *Grenz v. EBI Orion Group*, 1992 WL 158158 (9th Cir. July 9, 1992); *Henderson v. Workmens' Compensation Appeal Board*, 69 Pa. Commw. 613 (1982). This attempt to fabricate a conflict among the circuits completely ignores this Court's repeated teaching that the state action inquiry depends upon the factual context in which the controversies arise. *Lugar v. Edmondson Oil Co.*, 457 U.S. at 939.

The Third Circuit's decision invalidated a singular provision of the Pennsylvania Workers' Compensation Act, a law which contains hundreds of sections and thousands of subsidiary provisions. As to how the provisions at issue here are "typical" of those of other states, the Insurers never explain. Contrary to the Insurers' bald assertion, workers' compensation laws vary in many respects from one state to the next. There is no federal common law of workers' compensation and any court faced with a similar state action analysis under workers' compensation provisions in another state will have to



start not with the *Sullivan* decision, but with the statute at hand.[4] By definition, therefore, there can be no conflict among the circuits in a case such as this, because each circuit court which considers the role insurers and self-insured employers play in a particular workers' compensation system are construing uniquely different state laws. There is no need for this Court to embroil itself in the intricacies of a parochial dispute. Even within the Third Circuit, the decision will have applicability only in Pennsylvania, because the statutes in New Jersey, Delaware, and the Virgin Islands will have to be construed according to their own terms. Accordingly, regardless of decisions in other circuits which may have reached a different conclusion when construing the provisions of another state's workers' compensation statute, by definition the Third Circuit's decision cannot be in conflict with another court's decision regarding another state's statute because the inquiry is fact driven and turns on the subtleties inherent in each state's particular statutory scheme. This Court cannot, and should not attempt to, pronounce a national rule regarding when insurance companies are state actors under the various workers' compensation statutes. This issue can only be resolved on a case by case basis.

**Public Benefit vs. Private Contract**

This is not a case involving "judicial intervention" or the regulation and balancing of the interests of private parties, as the Insurers would have the Court believe. This case does not involve parties to a private contractual dispute. The workers'compensation system in Pennsylvania is not a private industry, but a public benefit system established by legislative enactment. This may or may not be true in other states.

---

[4] For the same reasons that this Court's guidance is unnecessary in the field of workers' compensation law, there will never be a Restatement of Workers' Compensation.

That workers' compensation benefits are public benefits as a matter of law in Pennsylvania is evident from the following: 1) The Pennsylvania Constitution was specifically amended in 1915 in response to strong public pressure to enable the legislature to provide for workers' compensation coverage. Pa. Const. Art 3 § 18; 2) The right to workers' compensation is guaranteed to all workers in Pennsylvania who are not self-employed, and the Commonwealth itself vigorously enforces that right. Workers cannot bargain away their right to workers' compensation coverage, and they may not opt out in favor of their own privately obtained coverage. An injured worker aggrieved by the conduct of his insurance company cannot drop his coverage and shop for a new carrier. The injured worker is not a party to any contract other than the one with his employer; moreover, the employer's duty to provide for workers' compensation does not emanate from a contract or insurance policy, but from state law; 3) Workers' compensation constitutes a *quid pro quo* for the right of workers to sue their employers for damages as a result of workplace injuries. It is the exclusive remedy for such injuries. *Winterberg v. Transportation Insurance Co.*, 72 F.3d 318 (3rd Cir. 1995); 4) The private resolution of workplace injuries through civil litigation was replaced by a publicly administered Bureau which dictates the level of benefits to be paid, the circumstances under which benefits can be paid, as well as those under which they can be suspended and terminated; 5) Workers' compensation has been deemed by the Pennsylvania Courts to be a public benefit, equivalent to "a soldier's right to a pension". *Keller v. Old Lycoming Township*, 286 Pa. Super. 339, 348 n.6, 428 A.2d 1358, 1363 n.6 (1981). *See also Winterberg, supra* (distinguishing workers' compensation from private insurance). The Pennsylvania Supreme Court has recently rejected the premise that workers' compensation benefits are a matter of contract: "The workers' compensation system as it is now structured is purely an exercise of the 'police power' of the Commonwealth regulating the employer-employee relationship. As a result, there is no longer any basis for construing the provisions of



the workers' compensation Act in contractual terms". *Bible v. Commonwealth of Pennsylvania*, 548 Pa. 247 (1997).[5]

The Insurers attempt to minimize the type of deprivation at issue here and to bolster their business as usual contract formulation by denying that medical benefits are at issue at all, characterizing the dispute as one over "bills," rather than treatment, and by insisting that the injured workers can be fully reimbursed later for any loss they incur now. These suggestions contradict the factual context of the Pennsylvania workers' compensation system. More correctly, an injured worker's receipt of medical benefits under the Pennsylvania Act has always been through the receipt of treatment, and not by way of direct payments to claimants. In practice, those benefits are furnished through the payment of medical bills submitted by medical providers to the insurance company or employer. Thus, while it may be true in some sense that "bills" are at issue, those bills are merely the vehicle through which medical benefits are provided under the Act. When the bills are not paid, an injured worker's treatment is ordinarily stopped by the doctor or other medical provider, and benefits are thereby eliminated.

**_Lochner_ Is Inapplicable**

The Insurers have also resurrected the ghost of *Lochner* in an effort to obscure the true nature of their challenge here, which calls into question the power of a federal court to hold a state law unconstitutional when that law tramples upon vested property rights and denies the procedural rights guaranteed by the Fourteenth Amendment. *Lochner* can rest in peace, however, because the Third

---

[5] It should also be noted that in the context of workers' compensation, insurers are treated differently than they are in other insurance contexts. For instance, insurance carriers cannot be sued for bad faith handling of workers' compensation claims. *See Winterberg, supra.* Accordingly, in this context the insurers assume the mantle of immunity generally reserved for the state itself.

Circuit in this case carefully adhered to its prescribed role in our constitutional system. It evaluated the procedures utilized by the Pennsylvania legislature to effectuate its legislative goals, but made no policy judgments whatsoever as to the wisdom or desirability of the legislation itself. Unlike the Insurers, the Court was mindful of the important distinction between a substantive and a procedural due process claim. As a guardian of due process rights, the court undertook the very task which the federal courts are empowered to perform, and must perform, in order to guarantee that Constitutional rights do not fall victim to parochial efficiency and self-interest.[6] *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Martin v. Hunters' Lessee,* 14 U.S. (1 Wheat.) 304 (1816).

## REASONS FOR DENYING THE WRIT

### I. THE COURT OF APPEALS CORRECTLY FOUND THE INSURERS TO BE STATE ACTORS IN THE CONTEXT OF UTILIZATION REVIEW.

#### A. The Analysis Below Was Based On Well Established Supreme Court Precedent.

The Court of Appeals held that the private insurers within the Pennsylvania Workers' Compensation system are state actors when they invoke utilization review to terminate claimants' medical benefits without prior notice or an opportunity to be heard. Relying on established precedent, the court examined the relationship among the Commonwealth, employer, and the insurance companies, and found an intimate interconnection between them in the context of the

---

[6] Justice Oliver Wendell Holmes once wrote, in this regard: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states". O.W. Holmes, Collected Legal Papers at 295-6.



Workers' Compensation system as a whole, and in utilization review in particular. The court further found that the decision by the insurers to terminate injured workers' state-guaranteed entitlements was not self-executing, but, rather, required the direct participation and approval of the state. Thus, far from being an unwarranted extension of the state action doctrine, or, as Insurers contend, a decision devoid of any "coherent theory" of state action, the Third Circuit's decision was logically compelled by the controlling precedents set by this Court. *West v. Atkins,* 487 U.S. 42 (1988); *Tulsa Prof'l.Collection Svcs., Inc v. Pope,* 485 U.S. 478 (1988); *Lugar, supra.* Those have established a two-part inquiry for discerning state action on the part of purportedly private parties:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible...Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

*Lugar v. Edmondson Oil,* 457 U.S. 922, 937 (1982).

In an attempt to manufacture an error of law warranting review, Insurers complain that the opinion of the Court of Appeals did not fit its state action analysis into predetermined state action templates they assert have been required by this Court. Contrary to this assertion, this Court has never adopted a formulaic and rigid approach to state action. Although it has found state action where a symbiotic relationship exists between the private entity and the state, *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961); where the private entity is engaged in a public function, *Marsh v. Alabama, 326 U.S. 501 (1946);* and where there is a close nexus between the state and the private entity, *Flagg Bros.,* 436 U.S. at 157-59; *Blum v. Yaretsky,* 457 U.S. 991 (1982), this Court has never decreed that state action is necessarily absent in other contexts. To the contrary, this Court has repeatedly indicated that determining

whether an otherwise private actor is a state actor in a given circumstance is necessarily a "fact-bound inquiry." In *Lugar*, for instance, the Court did not utilize any of the three tests espoused by the Insurers, and eschewed reliance upon any one test, because it was unclear "whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry which confronts the court in such a situation." *Lugar*, 457 U.S. at 941. "For only by sifting through facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 939.

The Court's most recent state action cases, none of which were cited by Insurers in framing their assault on the lower court's state action holding, have not relied upon any distinct test for a determination of state action but have looked to the totality of the circumstances involved in the situation before it. *See e.g. West, supra; Tulsa, supra; Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). In *Edmondson*, the Court stated that in determining whether a private litigant is to be deemed a state actor, it is appropriate to examine 1) the extent to which the actor relies on governmental assistance and benefits; 2) whether the actor is performing a traditional government function; and 3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority. Thus, contrary to the analysis espoused by the Insurers, this Court did not state a series of discrete tests and apply them separately to determine whether each by itself was satisfied. Rather, as it had in *West* and *Tulsa*, the Court considered a number of factors and weighed them to determine whether, all things considered, the otherwise private conduct could fairly be deemed state action. It was this analysis which governed the Third Circuit's decision.



### B. Applying Established State Action Analysis, The Court Below Properly Found State Action

There is simply no foundation for the Insurers' suggestion that the lower court's analysis constitutes a misapplication of this Court's precedents or fails to conform to a specific theory of state action.[7] Moreover, it is clear from the thorough analysis conducted by the court below that its conclusion regarding the Insurers as state actors is well supported and correct. The Third Circuit conducted a fact intensive inquiry which focused on the relationship between the state and the insurance carriers in providing injured Pennsylvania employees their "constitutionally protected entitlement" to medical treatment under the Act. App. 13a-14a. First, the court recognized that workers' compensation benefits in Pennsylvania, unlike other types of insurance, are a public benefit, guaranteed by statute and protected by the state constitution. App. 14a. Second, the court focused on the fact that "[t]he system is mandatory; an employee cannot opt-out of the Pennsylvania Workers' Compensation scheme." App. 14a. Third, the court observed that the system is entirely state-created, self-contained, and administered by the government alone. App. at 14a. Fourth, in defining the insurers' role in the context of the statute, the court recognized that, pursuant to the elaborate statutory scheme enacted by the state, the burden of ensuring that injured employees receive their guaranteed benefits is placed on the employer, who has the option of fulfilling its statutory duty by either

---

[7] Certainly, if Act 44 had granted to workers denied a medical benefit the power automatically to invoke an order commanding payment of that benefit by the private insurer of his or her employer, the Insurers would have promptly (and correctly) presented to the courts the argument that the injured worker had improperly been cloaked with the mantle of state action. No lesser status should be accorded to private insurers where the insurers were granted that power to stop medical benefits. *Cf. Dowty Corp. v. Workers' Compensation Appeal Board (McKelvey)*, 152 Pa. Commw. 467 (1993) (Employers/insurers unsuccessfully challenged obligation to pay for treatment that they deemed unnecessary on Due Process and Equal Protection grounds).

self-insuring, or obtaining workers compensation insurance from a private carrier or the State Workers' Insurance Fund, a Commonwealth agency. When the employer obtains workers' compensation insurance, the insurer assumes all of the employer's obligations and liabilities under the Act, and in effect, stands in the employer's shoes vis-a-vis both the state and the employee. Accordingly, as the court reasoned, "[a]lthough the insurance companies are private entities, when they act under the construct of the Workers' Compensation system, they are providing public benefits which honor State entitlements. In effect, they become an arm of the State, fulfilling a uniquely governmental obligation under an entirely state-created, self-contained public benefit system." App. 14a-15a. Finally, the Court found significant the fact that "[t]he right to invoke the supersedeas, or to stop payments, is a power that traditionally was held in the hands of the State." App. 15a. Under the Pennsylvania scheme, the State delegated this traditional state power to the insurance carriers, thereby empowering them to "compromise an employee's State-created entitlement."[8] App. 15a. Moreover, the power of the insurers and self-insured employers to terminate an employee's benefits is not self-executing: "The insurers have no power to deprive or terminate such benefits without permission and participation of the Commonwealth . . . [which] is intimately involved in any decision by an insurer to terminate an employee's constitutionally protected benefits because an insurer cannot maintain a supersedeas of medical payments without first obtaining authorization from the Bureau." App. 15a. As the court below reasoned:

---

[8] The Commonwealth cannot avoid its constitutional and statutory duty to provide benefits by delegating that responsibility to a private party or entity. *West v. Atkins*, 487 U.S. 42, 56 (1988). In *West*, the Court reasoned that "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *Id.*



> However this authorization may be characterized, any deprivation that occurs is predicated upon the State's involvement... The [Bureau] is intimately involved throughout, and without that involvement the supersedeas could not operate... [The Act] inextricably entangles the insurance companies in a partnership with the Commonwealth such that they become an integral part of the state in administering the statutory scheme. This relationship more than suffices to satisfy the constitutional requisites under the tests--varied though they may be--for state action.

App. at 19a.

In short, like the nonclaim statute at issue in *Tulsa*, "the supersedeas could not operate" without the direct involvement of the Commonwealth. App. 15a. There is simply no reason for this Court to grant review in a case in which the lower court so closely scrutinized the factual context of the statutory scheme, particularly in light of the obvious and pervasive state entanglement between the Commonwealth, the employers, and the insurance companies within that state-created and state-run system.

### C. The Decision Below Does Not Conflict With Other Circuits.

Insurers' alternative argument that *certiorari* should be granted because the state action question splits the Circuits is equally baseless. The Third Circuit's state action analysis in this case was highly dependent upon the operation of the unique characteristics of the Pennsylvania workers' compensation system and the particular characteristics of the utilization review procedures being challenged. The workers' compensation systems of *each* of the fifty States are necessarily different from one another. Each is the product of goals, breadth of coverage, and means of enforcement which differ from

state to state. These differences among the states preclude the factual uniformity needed to create a split in the circuits. Any decision involving the workers' compensation system of any one state *must* be, as the Court of Appeals pointed out below, "necessarily inapposite" to the cases from another State. App. 17a.. Such a case, by definition, fails to call out for national guidance by this Court.

To bolster their conflict argument, Insurers point to four Courts of Appeals that have reached differing conclusions as to whether private insurers acting pursuant to various state workers' compensation statutes are state actors. Three of the four Courts of Appeals decisions cited by Insurers, however, are so factually directed that they were ordered by the issuing court to be unpublished, and *cannot* be cited under the rules of the courts which issued them: *Stanescu v. Aetna Life and Cas. Ins. Co., supra;*[9] *Fleming v. Worker's Compensation Com'n of Virginia, supra;*[10] *Grenz v. EBI Orion Group, supra.* [11] Because the cases cannot bind even courts in their own circuits, it is highly improper to argue that they establish a conflict in the circuits that warrants this Court's review.

---

[9] In large capital letters at the top of the electronically obtained unpublished opinion the following admonishment pursuant to Second Circuit rule appears: "NOTICE: THIS SUMMARY ORDER MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY".

[10] The electronically retrieved version of the unpublished decision has a notice warning that the "citation of unpublished dispositions is disfavored." *Fleming* uses only two paragraphs to deal with the issue of state action, and, of course, necessarily deals with the workers' compensation system as statutorily created by the Commonwealth of Virginia. The decision affirms the grant of a Motion to Dismiss and does not set forth the facts of the Virginia system.

[11] The electronically retrieved version of the unpublished opinion states that "dispositions other than opinions or orders designated for publication are not precedential and should not be cited."



Moreover, each decision cited arises in the context of a different statutory framework than the one at issue here. *Stanescu*, for instance, distinguished itself from *Baksalary v. Smith*, 579 F. Supp. 218 (E.D.Pa. 1984), a case which involved a strikingly similar provision of the Pennsylvania's Workers' Compensation Act, and stated that the outcome might have been different if the workers' compensation system in Connecticut (locus of the case) contained certain features of the Pennsylvania system.[12] *Accord Grenz v. EBI/Orion Group* (distinguishing Montana statute from Pennsylvania). The only published decision the Insurers could properly cite is *Barnes v. Lehman*, 861 F.2d 1383 (5th Cir. 1988), but even that decision does nothing to advance their argument. *Barnes* involved the statutory workers' compensation system in Texas in 1988. As the *Sullivan* opinion itself pointed out, there are several distinguishing differences between the Texas system and the Pennsylvania system, making the case "necessarily inapposite" to *Sullivan.*[13] App. 17a.

---

[12] It is worth noting that one of the judges in the *Stanescu* decision is the Honorable Louis H. Pollak, of the Eastern District of Pennsylvania who was sitting by designation, who authored the opinion in the *Baksalary* decision for the three Judge panel, and who would therefore clearly understand the differences whereof he speaks. *Stanescu* cannot be seriously compared to *Sullivan* in any event, because the injured workers in that case relied solely upon the exclusivity of workers' compensation for work injuries in Connecticut as their predicate for state action. The Court quite correctly pointed out that regulation, standing alone, is insufficient to render private conduct state action. In *Sullivan*, the state action analysis was far more developed, and relied upon exclusivity as just one of the many factors in the state action equation. *Stanescu* is also distinguishable from the present case because there was no interdependence between the insurers and the state and there was no state review of any kind.

[13] The *Sullivan* Court noted several distinguishing features: the State's recommendation that Mr. Barnes' compensation be reinstated did not need to be followed by the insurer (and was not); it was unclear whether employers and employees could opt out of the system; it was not clear whether State involvement

The Court's state action holding is fact-based, and relies on the intricacies and subtleties created by the Pennsylvania statutory scheme. There is no reason for this Court to expend its time and its guidance on an issue that can never arise in the same way elsewhere.[14]

## II THE THIRD CIRCUIT'S DUE PROCESS HOLDING DOES NOT WARRANT REVIEW

### A. The Due Process Issue Is Moot.

The Third Circuit held that Sections 306(f.1) (5) and (6) of the Pennsylvania statute violated the due process clause of the Fourteenth Amendment by denying claimants adequate notice or an opportunity to be heard prior to the termination of their medical benefits. At a minimum, the court held, due process requires "(1) timely and reasonable notice of the imminent suspension of the medical benefits and treatment *before* suspension takes place; (2) a description of the reasons why utilization review has been invoked; (3) an opportunity and time to submit a personal statement in writing regarding the employee's view of the reasonableness and/or necessity of the disputed medical treatments; and (4) a description of the procedures under which the employee can appeal an adverse determination." App. 33a.

---

was required before termination of benefits. App. *at* 17a.

[14] The one decision cited by Insurers as showing opposition to *Sullivan* by "the state courts [*sic*] of Pennsylvania" [Insurers' Petition at p. 14], *Henderson v. W.C.A.B. (Rockwell Intern., Inc.)*, 69 Pa.Cmwlth. 613 (1982), is a Commonwealth Court case that dealt with the very statute found unconstitutional shortly thereafter by the *Baksalary* decision. One of the main bases of the *Henderson* decision was that "the suspension of disability benefits essentially involved a private contractual matter between the parties[.]" *Id.* The Pennsylvania Supreme Court has recently ruled that, because of changes to the Workers' Compensation Act, "there is no longer any basis for construing its provisions in contractual terms." *Bible v. Com., supra*. Similar arguments by Insurers must also fail.



Subsequent to the Third Circuit's decision, the Commonwealth of Pennsylvania, which has not filed a Petition for a Writ of Certiorari, modified its procedures. A new form has been issued, and injured workers now receive pre-termination notice that utilization review has been filed, a description of the reasons for the request for review, and an opportunity to submit written testimony to the utilization reviewer prior to the termination of the medical benefits. The changes made by the Commonwealth of Pennsylvania to the utilization review procedures render the due process issues moot, and, accordingly, both Petitions for Writ of Certiorari should be denied.[15] *Hall v. Beals*, 396 U.S. 45, 48 (1969)("we review the judgment below in the light of the [ ]statute as it now stands, not as it once did").

### B. Whether Medical Benefits Are Property Was Not Pressed Or Passed Upon Below

This Court has repeatedly stated that it will not grant a Petition for a Writ of Certiorari unless the issue has been "pressed or passed upon" in the Court of Appeals. *Illinois v. Gates*, 462 U.S. 213, 222-223 (1983). An issue is not considered "pressed or passed upon" unless there has been a real contest on the issue in the court below. *Illinois*, 462 U.S. at 222-223. Accordingly, the mere restatement or application of settled law is insufficient to satisfy the requirement. *Id.*

Notwithstanding this basic principle of appellate review, Petitioner-School District argues that the medical treatment that the injured workers were receiving prior to termination is not property within the meaning of the Fourteenth Amendment because the injured worker does not have a constitutionally protected interest "in any

---

[15] Because the due process issues are now moot, the question of state action on the part of the insurers has become purely academic, and therefore does not warrant review by this Court.

medical care a worker chooses merely because the worker believes the treatment provides relief." School at 8. No such contention was ever raised or contested by any party, either in the District Court or in the Court of Appeals. Indeed, Senior Judge Garth noted that "[n]either party disputes the district court's ruling that workers' compensation benefits are a constitutionally protected property interest subject to scrutiny under the Due Process Clause of the Fourteenth Amendment."[16] App. 20 n.23. Because the issue was never "pressed or passed upon" in the Court of Appeals, or the District Court, the School District's Petition for a Writ of Certiorari should be denied. *Illinois*, 462 U.S. 222-223.

### C. Workers' Compensation Medical Benefits Are "Property" Under Pennsylvania Law

The School District's argument that the benefits at issue here are not constitutionally protected property grossly mischaracterizes the nature of the interest involved and contradicts well established state and federal law. This Court has consistently held that the property rights protected by the due process clause of the Fourteenth Amendment do not flow from the Constitution, but rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Pursuant to the Pennsylvania Constitution, the Pennsylvania Workers' Compensation Act, and the decisions of the Pennsylvania Courts interpreting them, the medical

[16] None of the parties raised or contested the issue in the District Court. Although there was no contest, the District Court began its opinion by citing to well established precedent and holding that medical benefits constituted property protected by the Fourteenth Amendment. App. 68a.



benefits that the Respondents were receiving are clearly property as defined by Pennsylvania law.

The Pennsylvania Constitution was amended in 1915 to enable the state legislature to provide for workers' compensation coverage. Pa. Const. Art. 3 Sec. 18. The Pennsylvania Legislature has created a system that guarantees to all workers injured on the job the right to workers' compensation benefits, including medical treatment.[17] Pursuant to the terms of the Act, this right is guaranteed and cannot be bargained away, and neither the employer nor the employee can opt out of the system. A Pennsylvania worker injured on the job therefore has a statutorily guaranteed "claim[ ] of entitlement to those benefits." *Roth*, 408 U.S. at 577. The Act provides that these benefits are not terminable at will, and thus they are clearly property within the meaning of the Fourteenth Amendment. *Memphis Light, Gas, and Water Division v. Craft*, 436 U.S. 1, 12, (1978).

The Pennsylvania courts that have construed the provisions of the Workers' Compensation Act support this conclusion. Consistently, the state courts have recognized that the statutorily guaranteed entitlement to workers' compensation benefits is a form of property. *Congleton v. Department of Public Welfare*, 48 Pa. Commw. 615, 617 n.2 (1980) ("we find no merit in appellant's argument that a pending workmen's compensation claim is not property"); *Sayre v. Textile Machine Works*, 129 Pa. Super. 520, 523 (1938) (". . . compensation payments . . . are intended as a substitute for wages which the employee would have earned if he had not been injured"); *See also Kelmon v. Reiber*, 161 Pa. Super. 169 (1947) and *Keller v. Old Lycoming Township*, 286 Pa. Super. 339, 348 n. 6 (1981). Likewise, the federal courts that have addressed this issue have held that Pennsylvania Workers' Compensation benefits are

[17] The only exception is self-employed workers.

property protected by the Fourteenth Amendment. *Baksalary v. Smith*, 579 F.Supp. 218, 224-25 (E.D. Pa. 1984).

Petitioner-School District attempts to escape this well established line of state and federal precedent by characterizing the injured workers' interest as nothing more than an expectation in a particular kind of treatment that the "worker chooses merely because the worker believes the treatment provides relief." School at 8. This contention is simply wrong. As a factual matter, all of the injured workers were receiving paid medical treatment at the time their benefits were terminated. Therefore, the injured workers had more than a mere expectation in treatment; they had a fully vested right to treatment. Moreover, this treatment was prescribed by a health care professional, and not arbitrarily chosen by the injured worker, as suggested by the School District. In all of these cases, the injured worker had already been deemed eligible for the treatment under the provisions of the statute, and therefore had "a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577.

### D. The Third Circuit Properly Invalidated The Statute Because It Provided For No Pre-deprivation Notice Or Opportunity To Be Heard

The Third Circuit held that the utilization review provisions violate due process in two respects. First, the statute provides no notice at all to injured workers prior to the termination of their medical benefits, a contention which the state conceded at oral argument, and which the Insurers, themselves, concede in their Petition. App. at 23a; Ins. at 22 n.12. Second, the statute offers the injured workers no opportunity at all to challenge the termination of their medical benefits until many months (at least) after the deprivation of those benefits has been effected. App. at 30a.

The Third Circuit found the lack of pre-termination notice to the injured worker to be constitutionally fatal because it



> does not explain that a supersedeas or suspension of one's medical benefits may result nor does it explain what utilization review entails. In addition, it does not inform an employee of any procedures under which the employee can protest the suspension of the medical benefits or contest the merits on which the proposed deprivation is based.

App. 23a. Moreover, the court observed, the notice arrives after the benefits have already been terminated. App. 24a. The Court concluded that inadequate notice effectively strips an employee of his/her ability or opportunity to protest or minimize an unjustified deprivation. App. 24a. Furthermore, the court held that under the circumstances presented, due process requires some sort of opportunity to be heard regarding the basis of the proposed termination *before* it takes place. App. 25.

The Third Circuit's holding is a mainstream decision consistent with a well-settled and unbroken line of precedent from this Court, which sets forth two basic tenets of due process. First, "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action" is constitutionally required prior to the deprivation of a protected property interest. *Memphis Light, Gas & Water Co. v. Craft, supra*; *Fuentes v. Shevin, supra*. Second, due process ordinarily requires an opportunity for "some kind of hearing" prior to the deprivation of such an interest. *Memphis Light, Gas & Water, supra*, 436 U.S. at 19, *citing, Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 420, 437 (1982). In a case such as this, in which an established state procedure is being challenged, this Court has always required notice and an opportunity to be heard *before* the deprivation unless exigent circumstances exist or pre-deprivation process would be demonstrably impracticable. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Parratt v. Taylor*, 442 U.S. 584 (1981). This is true even if extensive post-deprivation remedies are afforded. *Connecticut v. Doehr*, 501 U.S. 1 (1991).

This Court has applied these principles in numerous factual contexts to invalidate state laws that failed to provide any notice or opportunity to be heard before the deprivation of a protected liberty or property interest. *Connecticut v. Doehr*, 501 U.S. 1 (1991)(real estate attachment); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)(public employment); *Logan v. Zimmerman Brush*, 455 U.S. 422 (1982)(cause of action); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 862 (1978)(utilities); *Goss v. Lopez*, 419 U.S. 565 (1975)(public education); *Fuentes v. Shevin*, 407 U.S. 67 (1972)(personal property); *Bell v. Burson*, 402 U.S. 535 (1971)(drivers' licenses); *Goldberg v. Kelly*, 397 U.S. 254 (1970)(welfare benefits). These cases and the due process principles enunciated in them apply to interim deprivations of property as well as to final deprivations. *See e.g. Connecticut v. Doehr*, 501 U.S. at 12; *Arizona v. California*, 460 U.S. 605, 638 n. 28 (1983); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Because no one disputes that the challenged statute permits a recognized property right to be disrupted without any pre-deprivation notice, the Third Circuit's decision that the statute is unconstitutional would have to stand regardless of how this Court might dispose of the other due process contentions raised by the Insurers. Because inadequate notice, standing alone, is enough to render the statute unconstitutional, *see e.g., Tulsa, supra; Memphis Light, supra; Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), there is no reason for the Court to examine the remaining constitutional issues because they will have no impact upon the ultimate resolution of the case.

The Insurers have alleged no exigency that would justify a departure from the fundamental requirements of pre-deprivation process. Neither is impracticability a barrier, as evidenced by the fact that, prior to the 1993 amendments, the Commonwealth required notice and an opportunity to be heard before medical benefits could be terminated. 77 P.S. Sec. 531. Moreover, since the *Sullivan* decision, the Commonwealth has modified the utilization review process to



require notice and an opportunity to be heard. Even in those rare situations in which this Court has approved post-deprivation procedures alone, it has required some assurance against arbitrary and unfounded interference in the enjoyment of the property interest, *e.g. Connecticut v. Doehr, supra. See also Gilbert v. Homar*, ___ U.S. ___, 117 S.Ct. 1807, 1812 (1997)("An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation"), *quoting F.D.I.C. v. Mallen*, 486 U.S. 230, 240 (1988). Here, there is no such assurance. The request for utilization review is not required to be based on any medical criteria whatsoever, or supported by even the slightest indicia of reasonableness. This Court has found on numerous occasions that "one-sided, self-serving, and conclusory submissions" elevate the risk of erroneous deprivation to an unacceptable level. *Connecticut v. Doehr, supra; Fuentes v. Shevin, supra*, 407 U.S. at 83. Thus, the Third Circuit's determination that the lack of a prior opportunity to be heard renders the statute unconstitutional must be upheld.

Once it is established that pre-deprivation process is due, the Court's decision in *Mathews* defines the extensiveness of the procedures to be afforded. The Third Circuit straightforwardly applied the three *Mathews* factors and concluded that the injured workers must receive an opportunity to submit a personal statement in writing to the utilization reviewer before their benefits can be constitutionally severed. That court looked first at the private interests involved, including the injured workers' interest in the relief that medical treatment provides, and the interest of the insurers and employers in not paying for unnecessary and unreasonable medical treatment. While the employers' interest was pecuniary, the injured workers' was not. The circuit found the workers' interest in medical treatment to be significant, and not protected by an after-the-fact

remedy. App. 28a.[18] (*See e.g. Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259-60 (1974)("To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health"). The circuit further held that the risk of erroneous deprivation was unacceptably high, given the injured workers' lack of notice and opportunity to be heard during the utilization review process. Although the medical review focuses upon the records of the treating physician, and the physician must be given the chance to speak with the reviewer, the Court was "hard-pressed to believe that the portrait of the employee's illness and treatment ... [could be] ....complete without a statement or other input from the injured worker". App. 29a.

According to the Court of Appeals, the governmental interest (which the Insurers fail to consider) would adequately be served by permitting the injured worker a pre-termination opportunity to respond. The government has a legitimate interest in containing costs and ensuring that benefits are paid only for reasonable and necessary treatment, but it has an equally compelling interest in preventing the erroneous termination of benefits to injured workers who have a continuing need for them. On balance, therefore, some sort of pre-termination process is necessary. App.30a. At a minimum, the Third Circuit concluded, "the employee should be granted the opportunity to present additional evidence *such as* his/her personal testimony in writing as to the reasonableness and necessity of the disputed treatment". App. 31a (emphasis added).

---

[18] It should be noted that the Pennsylvania courts have balanced the two interests and come to the same conclusion. *Stonebraker v. Workers' Compensation Board of Review*, 163 Pa. Commw. 468, 475 (1994)(despite employer's economic interest in terminating medical treatment which is not necessary as soon as possible, injured workers should be protected from potentially devastating economic or medical consequences stemming from unwarranted terminations of medical benefits).



The result obtained below was well within the parameters set forth in *Mathews*. Indeed, *Mathews* required more. In this context, the insurers' contention that the Third Circuit misapprehended the *Mathews* requirements based upon this Court's decision in *Doehr* borders on the frivolous. According to the Insurers, *Doehr* changed the *Mathews* analysis by requiring the court to balance two private interests, rather than a private interest vis-a-vis a governmental interest, where competing private interests are concerned. To the contrary, *Mathews* has always required an analysis of the private interests concerned in any procedural scheme.

The court below was well aware that two private interests needed to be weighed in this case. The Court dutifully weighed both interests and concluded that the injured workers' interest in their medical benefits outweighed the insurers' pecuniary interest in non-payment, an interest which can be reimbursed in the event that payment is ultimately deemed to be unreasonable and unnecessary.[19] Insurers' allegation that the Court refused to consider their interest is totally disingenuous. Whether *Doehr* added a second private interest

---

[19] The Insurers' contention that they cannot be reimbursed for payments later determined not to be owed is misleading at best. In fact, the insurers admit that they can apply to a supersedeas fund which provides for reimbursement. *Cf.* Ins. at 4 (alleging that insurers cannot recoup payments made for unnecessary and unreasonable treatment) and at p.2 n.1 (conceding access to supersedeas fund to reimburse for such payments). Although this fund is funded by the insurance carriers, this is a system which spreads the risk throughout the industry for unwarranted payments. It is not correct to suggest that no reimbursement to the insurer is available. It is the injured workers' interest in timely treatment which cannot be rectified in any manner by a post-deprivation remedy.

to the equation or not, the Third Circuit considered *all* the relevant interests and weighed them appropriately.[20]

Underlying the Insurers' argument is the fundamental complaint that due process was found to attach at all, because what is at issue here, in their view, is not the deprivation of medical benefits, but the timing of payment for treatment already received. Bills, not benefits, is how the Insurers would like to characterize what is at stake here. Insurers' argument grossly mischaracterizes the record in the court below, and the clear import of a request for utilization review. Medical bills are the vehicle through which medical benefits are delivered to injured workers in Pennsylvania. Unless the doctor or other medical provider agrees to work gratuitously,[21] once payments stop, so does the treatment. Several of the injured workers in this action have alleged that their ongoing medical treatment was stopped once the insurer or employer stopped paying for it on the basis of a

---

[20] The Insurers' contention that *Doehr* added a historical prong to the *Mathews* test misreads the Court's opinion and is unsupportable. The Court in *Doehr* cited to historical evidence to bolster the determination it had *already made* that due process had been violated by the lack of notice or pre-deprivation process. It was not a predicate of the decision. The Court was in effect stating that not only is the lack of notice and opportunity to be heard in these circumstances unconstitutional today, under modern conceptions of due process, it has always been unconstitutional. The same can be said of the statute here.

[21] The Pennsylvania statute precludes a medical provider from accepting payment for medical treatment for or on behalf of an injured worker. Accordingly, injured workers are medical captives until the utilization review process is completed. *Cf., West v. Atkins*, 487 U.S. 42 (1988); *See also Sullivan*, App. at 16a.



utilization review request.[22] These benefits are public benefits and the state has exclusive control over the resolution of disputes among the parties in the administration of those benefits. The procedures so utilized must satisfy due process. *Logan v. Zimmerman Brush*, 455 U.S. at 429 n. 5. The insurers' insistence that medical bills in this context are like car insurance is simply wrong.[23]

Moreover, the Insurers' contention that a split in the circuits warrants this Court's review is without merit. The extent to which due process attaches to workers' compensation schemes in the various states, as well as the extent to which process is due, depend upon the structure and procedures pertinent to each statute.[24] There can be

---

[22] This assertion must be taken as true since this case came before the court on a dismissal pursuant to F.R.C.P. 12(b)(6).

[23] The record in this case reveals that the utilization review system was specifically designed *not* to resemble a private insurance model.

[24] The cases cited by the Insurers to exemplify their "split in the circuits" only serve to demonstrate why each statute must be analyzed according to its own terms. *Cryder v. Oxendine*, 24 F.3d 175, 178 (11th Cir. 1994), involved a statute which gave the injured worker ten days advance notice that benefits would be terminated. There was no discussion by the court as to whether this notice was adequate under the due process clause, and in particular the requirements set forth in *Memphis Light*, because it was not challenged by the injured worker. *Sauceda v. Department of Labor and Industry*, 917 F.2d 1216 (9th Cir. 1990), involved a system in which the injured worker received a notice of impending termination along with a statement of reasons for the decision and the information that he had sixty days to protest or to seek reconsideration. Not only do these cases demonstrate that each state statute is different, but they directly refute the Insurers' contention that due process is not generally afforded by other state statutes prior to the

no declaration from this Court that all workers' compensation statutes in every state must comply with the same procedures in order to pass constitutional muster, or, as the Insurers would have it, that no workers' compensation statute can require prior notice and opportunity to be heard before benefits can be stopped. On the facts of this particular case, given the exclusiveness of the state's control over the administration of the system, the clarity of the public nature of the benefits at issue, and the fact that those benefits constitute constitutionally protected property, the Third Circuit's decision that the utilization review procedures are constitutionally deficient for their failure to accord pre-deprivation notice or opportunity to be heard of any kind was correct. A "legislature ... may not constitutionally authorize the deprivation of a [property] interest, once conferred, without appropriate procedural safeguards". *Logan*, 455 U.S. at 432. Review should therefore be denied.

## III. CONCLUSION

For all the reasons stated herein, Respondents respectfully request that the Petitions of the Insurers and the School District for Writ of Certiorari be denied.

Respectfully submitted,

Loralyn McKinley
*Counsel of Record*
McKinley and Vonier
1333 Race Street
Philadelphia, PA 19107
(215) 569-1644

---

termination of benefits.